IN THE

Supreme Court of the United States

OCT 27 1950
CHARLES ELMORE CROPLEY
CLERK

OCTOBER TERM, 1950

No. 388

JACK B. TENNEY, THE SENATE FACT-FINDING COMMITTEE ON UN-AMERICAN ACTIVITIES (a California Legislative Committee), HUGH M. BURNS, NELSON S. DILWORTH, FRED H. KRAFT, LOUIS G. SUTTON and CLYDE A. WATSON,

Petitioners,

vs.

WILLIAM PATRICK BRANDHOVE,

Respondent.

WILLIAM PATRICK BRANDHOVE,

Cross-Petitioner,

vs.

ELMER E. ROBINSON,

Cross-Respondent.

CROSS-PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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CROSS-PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Cross-petitioner prays that a writ of certiorari issue to review that portion of the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on June 30, 1950, wherein the judgment of the District Court dismissing cross-petitioner's complaint against cross-respondent was affirmed.

OPINIONS BELOW.

The memorandum opinion of the District Court (R. 124-126) is unreported. The opinion of the Court of Appeals (R. 137) is reported in 183 F. (2d) 121. A rehearing in the Court of Appeals was denied to cross-petitioner on August 9, 1950. (R. 148.)

JURISDICTION.

The judgment of the Court of Appeals was entered on June 30, 1950. (R. 147.) A rehearing in the Court of Appeals was denied to cross-petitioner on August 9, 1950. (R. 148.) The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED.

1. Whether cross-petitioner's complaint filed in the District Court sufficiently states a claim for relief against cross-respondent under the Civil Rights Statutes.

2. Whether the District Court's error in dismissing cross-petitioner's complaint against all defendants effectively deprives cross-petitioner of his right to amend such complaint as to his claim for relief against cross-respondent.

STATUTES INVOLVED.

The pertinent statutory provisions are printed in Appendix A, *infra* pp. i-iii.

STATEMENT.

Cross-petitioner filed a complaint in the District Court against Jack B. Tenney, The Senate Fact-Finding Committee on Un-American Activities (a California Legislative Committee), Hugh M. Burns, Louis G. Sutton, Clyde A. Watson and cross-respondent Elmer E. Robinson for general, special and punitive damages in the sum of $250,000.00. (R. 3.) The complaint was under the Civil Rights Statutes (Rev. Stat. Sections 1979, 1980; 8 U.S.C. Sections 43, 47 (3); Appendix A *infra* pp. i-ii) and alleged acts done or participated in by all the defendants

> "with malice and intent to intimidate and silence plaintiff and deter and prevent him from effectively exercising his constitutional rights of free speech and to petition the [California] legislature for redress of grievances, and also to deprive him of the equal protection of the laws, due process of law, and of the enjoyment of equal privileges and immunities as a citizen of the United States under the law, and so did intimidate, silence, deter and prevent and deprive plaintiff." (Complaint par. 13; R. 10.)

The complaint further alleged that all the acts done by the defendants, other than cross-respondent, were done under color of state law (Complaint par. 14; R. 10.) With regard to cross-respondent, the complaint alleges his liability as a conspirator with the other defendants, and in conjunction with paragraph 13 of the complaint above quoted, it was stated in said complaint as follows:

> "all defendants, including defendant Elmer E. Robinson, conspired for all of the aforesaid purposes and acted in furtherance of said conspiracy in the manner herein above set forth." (Complaint par. 14; R. 10.)

The substance of cross-petitioner's allegations in the complaint is: that cross-petitioner circulated a petition among the members of the California Legislature for the purpose of persuading the legislators to discontinue further appropriations of funds for the [California] Senate Fact-Finding Committee on Un-American Activities; that the subject matter of said petition was stated therein, as follows:

> "I, William Patrick Brandhove, charge that the California Senate Committee on Un-American Activities (The Tenney Committee) used me as an instrument to smear Congressman Franck R. Havenner as a 'Red' when he was a candidate for Mayor of San Francisco in 1947, and that the Republican machine in San Francisco and the campaign management of Elmer E. Robinson, Franck Havenner's opponent, conspired with the Tenney Committee to this end" (R. 18-19);

That while cross-petitioner was engaged in circulating his petition, defendant Tenney, the chairman of said Committee, communicated by telephone with cross-respondent and discussed with him "ways and means of best thwarting the charges contained in said petition and defeating the purposes stated in said petition and agreed that a hearing should be held on the following day by the Tenney Committee whereat defendant Elmer E. Robinson should appear as a voluntary witness and deny the truth of the charges with reference to him and his connection with the Tenney Committee contained in said circulated petition" (R. 5); that the hearing, as agreed, was held the next day and "was held, as was known to all defendants for the purpose and object of suppressing the criticism of plaintiff in his circulated petition and the charges therein directed against the Tenney Commttee and the individual defendants to the end that said Committee should obtain the appropriation of funds requested from the California Legislature" (R. 6); that cross-respondent participated in the hearing, first, by making a lengthy unsworn

statement, and then, after having been sworn as a voluntary witness, was by the chairman of the Committee led to and did engage in a course of justification as to the charges raised against him and the Committee in plaintiff's circulated petition (R. 7); that the hearing held was unfair, partial and unlawful, and in conformity with its purpose culminated in disparagement of plaintiff by reading into the record thereat, by the chairman of the Committee, an alleged and false criminal record of plaintiff and other slanderous statements (R. 7); that cross-petitioner was charged with criminal contempt by the Committee for failure to answer questions at such hearing, having taken the position that the hearing was improper and not for any legislative purpose but for the purpose of silencing, deterring, and intimidating him in his political campaign against the committee (R. 8); that cross-petitioner was arrested and imprisoned in advance of trial on such contempt charge, tried, and upon jury disagreement (11-1 for acquittal) the charges were dropped by the prosecution. (R. 9.)

The District Court dismissed the complaint before trial and entered judgment that the action be dismissed on the merits as to each and all the defendants. (R. 125.) Thereafter, on appeal of cross-petitioner, the United States Court of Appeals for the Ninth Circuit affirmed the judgment in favor of cross-respondent and reversed the judgment with remand for further proceedings, as to all other defendants. (R. 147.)

In holding the complaint against defendant Robinson insufficient as distinguished from the result reached as to all other defendants, the Court below referred to the allegations relating to the telephone conversation preceding the Committee hearing in question between defendant Tenney and defendant Robinson and stated, as follows:

> "It is more than doubtful whether these allegations are sufficient to implicate Robinson in a conspiracy with the Committee to abridge any of appellant's federally protected rights. We are unable to say that the Court was in error in dismissing the complaint as to him". (R. 145-146; 183 F. 2d 121, 124-125.)

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred:

1. In holding that the cross-petitioner's complaint is insufficient to implicate cross-respondent in a conspiracy to violate federal rights of complainant protected under the Civil Rights Statutes.

2. In failing to hold, assuming cross-petitioner's complaint was insufficient with regard to cross-respondent, that cross-petitioner was entitled to amend his complaint.

3. In affirming the judgment of the District Court with regard to cross-respondent.

REASONS FOR GRANTING THE WRIT.

I.

A. A conspiracy is an agreement or understanding between two or more parties to do an unlawful thing or to do a lawful thing in an unlawful manner. See *Pinkerton v. United States,* 151 F. (2d) 499, 501, 328 U.S. 640, 647.

B. An unlawful agreement need not be shown to exist in any formal way, it being rare that an unlawful agreement can be so shown, and the mutual understanding between the parties, or any two or more of them is all that is necessary to prove conspiracy.

See:

Direct Sales Co. v. United States, 131 F. (2d) 835;

Blumenthal v. United States, 158 F. (2d) 883, 332 U.S. 539, 557;

United States v. Paramount Pictures, 334 U.S. 131, 142.

C. It is not essential that each conspirator have knowledge of the details of the conspiracy, or of the exact part to be performed by the other conspirators in execution thereof; nor is it necessary that the details be completely worked out in advance to bring a given act within the scope of the general plan.

See:

Picking v. Pennsylvania Ry. Co., 5 F.R.D. 76, 77.

See also:

United States v. Randall, 164 F. (2d) 284, 288-289 (C.A. 7).

D. The law gives room for allowing the conviction of those discovered upon showing sufficiently the essential nature of the plan and their connections with it without requiring evidence of knowledge of all its details, or of the participation of others. Otherwise the difficulties not only of discovery but of certainty and proof and of correlating proof with pleading would become insuperable, and conspirators would go free by their very ingenuity.

See:

Blumenthal v. United States, 332 U.S. 539, 557;

United States v. Randall, 164 F. (2d) 284, 288 (C.A. 7).

Connerly v. Gishwiller, 162 F. (2d) 428, 433 (C.A. 7):

"A conspiracy is very nearly always from the nature of things, provable only by circumstantial evidence, by inferences reasonably deducted from facts proven. It may be inferred from the nature of the acts complained of, the individual and collective interest of the alleged conspirators, the situation, the intimacy and relation of the parties at the time of the commission of the acts, and generally, all of the circumstances preceding and attending the culmination of the claimed conspiracy."

E. The subjective elements of a conspiracy may be pleaded in general terms.

See 28 U.S.C. following Section 723c, Rule 9b Fed. Rules of Civil Procedure:

> "Malice, intent, knowledge and other condition of mind of a person may be averred generally."

II.

The decision of the Court below in the instant case disregards the foregoing settled rules of the law of conspiracy and hence arrives at an erroneous result.

(a) The Court below considered in isolation one pleaded incident, namely, the telephone conversation between Tenney and Robinson—an important link in the alleged conspiracy, but by no means the only fact pleaded to connect Robinson with the conduct of the other defendants. In so limiting its scrutiny to a single incident, the lower Court deviated from the fundamental rule that a complaint must be read as a whole with a view to give proper effect to the intent therein expressed.

In the instant case, the allegations of the complaint include the statement that complainant's circulated petition attacked *both* the Tenney Committee and the defendant Robinson because of their improper cooperation specified in complainant's pleaded petition at the election wherein Robinson was chosen Mayor of San Francisco. Thus, there is clearly pleaded a congruity of interest between Robinson

and the other defendants to intimidate and silence cross-petitioner.

Against this pleaded background, Robinson's connection as a conspirator clearly appears from complainant's allegations that defendant Tenney, immediately upon learning the fact that cross-petitioner was circulating his petition, contacted defendant Robinson and discussed with him by telephone the ways and means of best thwarting the charges affecting Robinson as well as the members of the Committee contained therein, and then and there agreed with Robinson to intimidate and silence cross-petitioner at a staged hearing for such purpose at which Robinson was to be the star witness; that such a hearing was immediately held as agreed; and that Robinson's appearance and conduct at such hearing constituted full performance of his agreement with Tenney. (R. 7-8, 45-46, 47, 50-67.)

With this pleaded congruity of interest, participation in planning the alleged abuses of State power and the active participation in the execution of such design, Robinson was clearly implicated in the alleged conspiracy. With such facts pleaded, cross-petitioner sufficiently links Robinson with the plan and the actions of the other defendants to buttress the allegations of ultimate fact that all of the defendants, including Robinson, in all purposes and actions set forth in the complaint. (Complaint pars. 13, 14; R. 10.)

III.

The fact that cross-respondent was not exercising state authority or himself acting under color of state law is immaterial since it is recognized that a defendant may be convicted of a conspiracy to commit an offense when in the nature of things he could not have committed the offense himself, if it be an offense which one of his co-conspirators could commit. This rule applies to actions in damages sounding in tort as well as to criminal actions.

See:

Johnson v. United States, 158 F. 69, 72 (C.A. 5);

United States v. Trierweiler, 52 F. Supp. 4 (D. C. Ill.);

Downs v. United States, 3 F. (2d) 855, 857;

Picking v. Pennsylvania Ry. Co., 151 F. (2d) 240;

Reitmeister v. Reitmeister, 162 F. (2d) 691;

Connerly v. Gishwiller, 162 F. (2d) 428 (C.A. 7);

11 *Am. Jur.,* 547, footnote 7;

5 A.L.R. 787;

74 A.L.R. 1114.

IV.

(a) All pleadings shall be so construed as to do substantial justice. This mandate is codified in Rule 8f of the Federal Rules of Civil Procedure and is the heart of the rules on pleadings.

See:

28 U.S.C. following section 723c (Rule 8f);
2 *Moore's Federal Practice,* 2nd Ed., p. 1711.

Maty v. Grasselli Chemical Co., 303 U.S. 198, 200:

"Pleadings are intended to serve as a means of arriving at fair and just settlements of controversies between litigants. They should not raise barriers which prevent the achievement of that end * * * Proper pleading is important, but its importance consists in its effectiveness as a means to accomplish the end of a just judgment."

(b) Under Rule 8a(2) of the Federal Rules of Civil Procedure a short and plain statement of the claim showing that the pleader is entitled to relief is sufficient. There is no requirement that the pleadings state facts or ultimate facts or facts sufficient to constitute a cause of action.

See:

Dioguardi v. Durning, 139 F. (2d) 774, 775 (C.A. 2);
28 U.S.C. following Section 723c (Rule 8a(2)).

(c) With regard to the pleadings the general rule is likewise stated in *Williams v. Miller,* 48 F. Supp. 277, as follows:

"It is inexpedient to determine grave constitutional questions upon a demurrer to a complaint, or upon an equivalent motion, if there is a reasonable likelihood that the production of evidence will make the answer to the questions clearer".

(Words used by Mr. Justice Stone and Mr. Justice Cardozo concurring in ***Borden's Farm Products Co. v. Baldwin,*** 293 U.S. 194, 213.)

As also stated in ***Williams v. Miller,*** supra, at page 280 thereof, the United States Supreme Court, where unconstitutionality of State Legislation was the contention:

> "* * * held it to be error to dismiss a complaint for failure to state a cause of action when it alleged facts such that their proof might reasonably lead the Court to hold the legislation unconstitutional. Polk Co. v. Glover, 305 U.S. 5, 59 S. Ct. 15, 83 L. Ed. 6 supra; Borden's Farm Products Co. v. Baldwin, 293 U.S. 194, 55 S. Ct. 187, 79 L. Ed. 281. In both cases the Court expressly refrained from deciding that the plaintiff would be entitled to relief upon proof of the facts alleged; the determination of that question was postponed until evidence of the actual facts was before the Court, so that the Court, 'in enforcing individual rights, shall not proceed upon false assumptions' ".

It can hardly be contended in the instant case, that the complaint, accepting its allegations as true, fails to state facts "utterly unsuggestive of the invasion of any constitutional right". See ***Williams v. Miller*** (supra) at page 280.

V.

In the instant case the District Court dismissed cross-petitioner's complaint against each and all the defendants. (R. 124-126.) Such decision precluding

responsibility of all defendants, at that stage, rendered the question moot as to whether cross-respondent Robinson was sufficiently charged with participation in a conspiracy in the pleadings. Upon reversal of the judgment of the District Court by the Court of Appeals with regard to all the defendants excepting cross-respondent, it was recognized by the Court below that the torts of the remaining defendants were sufficiently pleaded. With such recognition, the question then became vital: whether cross-respondent is sufficiently implicated by the pleadings as a conspirator. Even assuming the complaint to be insufficient for such purpose, it is submitted that the affirmance by the Court of Appeals without leave to amend the complaint with regard to said cross-respondent was improper.

See:

Federal Rules of Civil Procedure, Rule 15a;
28 *U.S.C.,* following Section 723c.

VI.

The issues raised in this cross-petition for a writ of certiorari are important for the following reasons:

(a) Under the Civil Rights Statutes, as well as under general tort and criminal law, the concept of conspiracy, its extent and limitations, and the concomitant problem of pleading in such cases has become of ever growing importance; fundamental federal rights are rarely denied by individual action; powerful combinations engage in such deprivations of the

rights of others and are in a position to hide the details of their plans and actions from the scrutiny of the persons injured and from prosecuting authorities. If the decision of the lower Court in the instant case with regard to cross-respondent be allowed to stand as a beacon for other Courts to follow, the effective enforcement of the Civil Rights Statutes would be blocked by insurmountable barriers to the pleader.

(b) The requirements for pleading a conspiracy under the Civil Rights Statutes can be no different from those under regulatory statutes such as the anti-trust laws, Economic Control legislation and other regulatory statutes. In criminal as well as civil proceedings of most important nature defendants could therefore rely on this recent decision of the Court of Appeals to cast doubt on rules of law which seemed before established.

(c) Important rules of pleading in the Federal Courts could be denied application in reliance on this decision which ignores the progress made under the new rules made in departure from common law pleading.

(d) Clearly the questions presented in this case are of primary importance in the protection of fundamental federal rights and cross-petitioner should not be denied his day in Court against anyone who, under his allegations, conspired to defeat those rights in question.

CONCLUSION.

For the foregoing reasons, this cross-petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
October 23, 1950.

Respectfully submitted,
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(Appendix A Follows.)

Appendix A

STATUTES INVOLVED.

(1) Rev. Stat. § 1979 from Act of Apr. 20, 1871 c. 22 § 1, 17 Stat. 13; Title 8 U.S.C. section 43:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

(2) Rev. Stat. § 1980 from Acts July 31, 1861 c. 33, 12 Stat. 284; Apr. 20, 1871 c. 22 § 2, 17 Stat. 13; Title 8 U.S.C. 47(3):

> "Conspiracies; to deprive citizen of rights or privileges. If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is

lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a member of Congress of the United States; or to injure any citizen in person or in property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

(3) Federal Rules of Civil Procedure, 28 U.S.C. following section 723c:

Rule 8 (a) (2):

(a) "Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third party claim, shall contain * * * (2) a short and plain statement of the claim showing that the pleader is entitled to relief * * *."

Rule 8 (f):

(f) "Construction of Pleadings. All pleadings shall be so construed as to do substantial justice".

Rule 9 (b):

(b) "Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge and other condition of mind of a person may be averred generally."

Rule 15 (a):

(a) "Amendments. * * * Otherwise a party may amend his pleading only by leave of Court or by written consent of the adverse party; and leave shall be freely given when justice so requires. * * *."

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ANSWER TO CROSS-PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

STATEMENT OF CASE.

Cross-petitioner William Patrick Brandhove filed a complaint in the United States District Court in San Francisco praying for $250,000 damages against all of the members of the Un-American Activities Committee of the California State Senate and cross-respondent Elmer E. Robinson. The complaint is based on an alleged conspiracy to deprive cross-petitioner of his civil rights.

The United States District Court dismissed the complaint as to all defendants, on appeal to the Circuit Court of Appeals for the 9th District the judgment of dismissal was affirmed as to cross-respondent Elmer E. Robinson and reversed as to the other defendants.

The other defendants have petitioned this Court for a writ of certiorari to the Circuit Court of Appeals and respondent therein has filed a cross-petition for a writ of certiorari to the same Circuit Court of Appeals in connection with its affirmance of the dismissal of the complaint as to this cross-respondent Elmer E. Robinson.

STATEMENT OF FACTS.

Briefly summarized, the complaint, with its exhibits, stripped of argument and conclusions, alleges:

That on January 28, 1949, cross-petitioner William Patrick Brandhove was circulating an unsworn petition among the California State Legislators which accused the Tenney Un-American Activities Committee of the State Legislature of using him as an instrument to smear Franck R. Havenner as a candidate for mayor in 1946, implicating cross-respondent Elmer E. Robinson, Mayor of San Francisco, and asserting that no further appropriations should be made to the Committee for their work (Complaint paragraph 3, lines 4-5); that from the exhibits attached to the complaint, it appears that this petition stated facts contrary to a sworn affidavit previously made in San Francisco by Brandhove (R. pp. 23 and 24, Exh. D, to complaint and R. pp. 42 and 43), and contrary to Brandhove's sworn testimony given in Oakland, Alameda County, before the Tenney Committee on a previous occasion. (R. p. 25, Exh. E to complaint.) The complaint further alleges that Tenney telegraphed the District Attorneys of San Francisco and Alameda requesting perjury action against appellant because of the statements' variance with his sworn testimony (R. p. 6); that Tenney advised Elmer E. Robinson by telephone of the charges in the Brandhove petition and that ways to thwart Brandhove were discussed and that it was agreed to hold a meeting of the Un-American Activities Committee, and that Robinson would appear as a witness to deny the Brandhove charges so far as they applied to Robinson (R. p. 5); that a subpoena was served on cross-petitioner to appear before the Tenney Committee on January 29, 1949, at 3:00 o'clock P.M.

(R. p. 5) (the Legislature had recessed on January 29, 1949 at 3:00 o'clock P.M.); that cross-petitioner Brandhove and his counsel appeared, as did cross-respondent Elmer E. Robinson; that Robinson made a statement and then testified under oath concerning the matters charged in cross-petitioner's petition to the legislature (R. p. 7); that cross-petitioner was sworn, but refused to testify, and was charged with a misdemeanor under Section 9412 of the California Government Code for refusing to testify (R. p. 8); that he was tried and, after a disagreement (11 to 1 for acquittal) the complaint was dismissed (R. p. 9); the complaint further alleges that the defendants with malice and intent to deter and intimidate cross-petitioner and effectively prevent him from exercising his right of free speech and to petition the California State Legislature did the acts complained of and that cross-respondent Elmer E. Robinson, conspired with all the other defendants in the manner set forth in the complaint (R. p. 10.)

Aside from the foregoing, the complaint is replete with accusations, conclusions and arguments.

ARGUMENT.

DISMISSAL OF COMPLAINT WAS PROPER.

The District Court's action (affirmed by the 9th Circuit Court of Appeals), in dismissing the complaint as to cross-respondent Elmer E. Robinson was correct and the cross-petition for writ of certiorari should be denied for three reasons:

1. The complaint fails to allege any facts showing that Elmer E. Robinson committed any wrongful act.

2. The Federal Court had no jurisdiction of the action.

3. In any event, Elmer E. Robinson, as a private citizen, not acting under color of State Authority, is not subject to suit under the statutes cited.

I.

COMPLAINT FAILS TO ALLEGE COMMISSION OF WRONGFUL ACT.

The complaint fails to allege any facts showing that Elmer E. Robinson committed any wrongful act. Aside from the legal obstacles to cross-petitioner's position, it is elementary that the complaint must allege the commission of some wrongful act or acts by cross-respondent Elmer E. Robinson and damage to the cross-petitioner.

Cross-petitioner's theory seems to be that Elmer E. Robinson conspired with defendant Tenney to cross-petitioner's damage, because Robinson received a telephone call from Tenney advising him of the charges in Brandhove's petition and that Robinson and Tenney discussed the matter, and the best means to thwart cross-petitioner Brandhove's charges, and it was agreed to have a committee hearing of the Tenney Committee, where cross-respondent Elmer E. Robinson would appear. It is not alleged nor contended that Elmer E. Robinson could call a meeting of the committee. Hence, the net result of Brandhove's

allegations in this regard is that Elmer E. Robinson agreed to appear before the committee to testify as to the charges made against himself and the committee. In sum, this is all that is or can be charged against Elmer E. Robinson, other than the fact that he appeared, made an unsworn statement and then testified.

Cross-petitioner's complaint is that because cross-respondent Elmer E. Robinson exercised his right of free speech, he, Brandhove, was injured by Robinson's denial, under oath, of cross-petitioner's unsworn charges, which appear from his complaint to be contrary to his previous sworn testimony. Such a position is inconsistent, to say the least, but is no more inconsistent than the many other well-known attacks on the Un-American Activities Committee of the various States and Congress.

Cross-petitioner demands damages because of his claim that his right to petition the California Legislature was impaired.

From a purely factual standpoint, cross-respondent Elmer E. Robinson contends that cross-petitioner has failed to allege facts showing any interference with (a) his right of free speech, or (b) his right to petition the California Legislature. Cross-petitioner has failed to sustain the burden of showing how anything done by Elmer E. Robinson was wrongful or damaging to him, and hence, it is submitted that the complaint was properly dismissed as to cross-respondent Elmer E. Robinson on the ground that no facts are alleged that competently charge him with a wrongful

act. In a civil action for damages under Sections 43 and 47 of Title 8 U.S.C.A., the action is based on the wrong or wrongs perpetrated by the defendant or defendants. There is no cause of action for a civil conspiracy as such. This question was thoroughly discussed in *Moffett v. Commerce Trust Co.*, 75 F. Supp. 303. In that case, the plaintiff sued several persons for damage resulting from a conspiracy which deprived her of due process of law and equal protection of the law. She based her action on Sections 43 and 47 of Title 8 U.S.C. The action was dismissed and the Court said:

> "This being an action for a civil wrong wrought under an alleged conspiracy, it must not be forgotten that the gist or gravamen of the action is not the conspiracy itself but the civil wrong done under the conspiracy and which wrong or wrongs resulted in damage to plaintiff."

and,

> "It is the rule, therefore, that each tortious act resulting in damage creates an independent, separate and distinct cause of action against the conspirators.
>
> "An inspection of plaintiff's amended complaint shows that it contains many alleged tortious acts. These are not separated but are incorporated in one complaint as if there was a single cause of action, and, at the conclusion of the complaint covering 83 typewritten pages, plaintiff prays damages as above set out. The complaint partakes of the nature of a Federal indictment in the case of a criminal conspiracy and the alleged tortious acts are treated merely as overt acts. This, of

> course, cannot be done under the Federal rules of Civil Procedure. 28 USCA following Section 723C."

See also Vol. 15, Corpus Juris Secundum, Conspiracy, Section 21.

From a careful reading of cross-petitioner's complaint in our case, we must conclude that he fails to allege a single wrongful act committed by cross-respondent Elmer E. Robinson, and further fails to allege how any act of said cross-respondent caused him or his property any damage.

In *U.S. v. Josephson,* 165 F. (2d) 82, the Court, in affirming the conviction of defendant for refusing to testify before the Congressional Un-American Activities Committee said:

> "Thus, the only real basis for the appellant's contention seems to be that in some way the First Amendment in protecting freedom of speech guarantees such privacy in speaking as the particular speaker may desire, and that this privacy is violated by whatever disclosure occurs incidental to an investigation for legislative purposes. This is a fallacy essentially based upon the idea that the Constitution protests timidity."

Paraphrasing the foregoing quotation, we may say that the cross-petitioner contends that the 14th Amendment somehow protects him and his utterances from criticism and enjoins silence on those he selects for his criticism, and no one should be permitted to answer his accusations.

Furthermore, the only action that cross-respondent Elmer E. Robinson could have conspired to do was to agree to attend a committee meeting at which he would testify to the falsity of the Brandhove charges. He is not charged with conspiring to charge Brandhove with criminal contempt and then trying him. Such would be impossible because if Brandhove had answered the questions submitted to him by the committee no further proceedings would be in order and the matter would have been ended, if he testified to the truth. If Brandhove is correct, no citizen would be safe in taking the stand in a hearing before a Legislative Committee without subjecting himself to the charge of violating the civil rights of one with whom he disagrees. This must be the logical result of the Brandhove contentions. If Brandhove makes a public statement accusing a citizen and a Legislative Committee of joining together in the commission of improper acts, is the citizen foreclosed from appearing before the committee and testifying that the charges are false? This cross-respondent believes freedom of speech means freedom to all.

Therefore, it is submitted that on a purely factual basis, the complaint was properly dismissed for failing to allege the commission of any wrongful acts by cross-respondent Elmer E. Robinson, or for that matter by any other person.

II.

THE FEDERAL COURT HAD NO JURISDICTION OF THE ACTION, AND THE ACTIONS OF THE CALIFORNIA STATE SENATE UN-AMERICAN ACTIVITIES COMMITTEE WERE LAWFUL AND NOT SUBJECT TO ENQUIRY BY THE COURTS.

In a petition to this Court the members of the Un-American Activities Committee of the California State Senate have asked that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit to the end that upon a review of the case the judgment of said Circuit Court be reversed, thereby affirming the District Court's action in dismissing the complaint.

Unless the actions of the committee and its members resulted in an actionable wrong for which Sections 43 and 47 of Title 8 U.S.C.A. afford relief the complaint of cross-petitioner Brandhove must fall as to all defendants, including cross-respondent Elmer E. Robinson, who is charged with conspiring with the other defendants.

In discussing the legal obstacles to cross-petitioner's action in the Federal Court, we must assume that his freedom of speech and right to petition the California Legislature was interfered with or obstructed.

Cross-petitioner bases jurisdiction on Sections 43 and 47 of Title 8 U.S.C.A. These statutes were adopted as enabling acts to the 14th and 15th Amendments to the United States Constitution, and hence, the scope of their application is limited by the scope of the amendments.

United States v. Cruikshank, 92 U.S. 542, 23 L. Ed. 588.

In the first place, it seems clear that the right to petition the California Legislature is not a right protected by the 14th and 15th Amendments. In *Snowden v. Hughes,* 321 U.S. 1, 88 L. Ed. 497, it was held that right to be a candidate to a State office is not protected by the 14th Amendment.

Other rights not protected by the 14th Amendment from State action are:

Right to trial by jury in a State Court.
Tompsett v. Ohio, 146 Fed. (2d) 95.

Freedom from unreasonable searches and seizures.
United States v. Crosby, 1 Hughes 448, Fed. Case No. 14,893.

Right to indictment by Grand Jury.
Maxwell v. Dow, 176 U.S. 581.

Prohibition against self-incrimination.
Adamson v. California, 332 U.S. 46.

Right to be charged by indictment in felony cases.
Hurtado v. California, 110 U.S. 516.

In *Hardyman v. Collins,* 80 F. Supp. 501, we find an excellent discussion of the difference between rights protected by the 14th Amendment and those that are personal and come under solely State jurisdiction.

Thus, if any right protected by the 14th and 15th Amendments was violated, it was cross-petitioner's right to freedom of speech. This right is protected from State action by the "due process" clause of the 14th Amendment.

Douglas v. Jeannette, 319 U.S. 15, 87 L. Ed. 1324.

The law is clear that Section 43 of Title 8 U.S.C.A. applies to protection against violation of due process of law, and Section 47 of Title 8 U.S.C.A. (conspiracy section) applies only to denial of equal protection of the laws. In a case footnote to *McShane v. Moldovan,* 172 F. (2d) 1016, the Court said:

> "Sections 43 and 47 grant separate and distinct rights of action. Section 43 gives a cause of action for denial of due process of law; and Section 47, for denial of equal protection of the laws. See Mitchell v. Greenough, 9 Cir., 100 F. (2d) 184; Bottone v. Lindsay, 10 Cir., 170 F. (2d) 705."

In *Mitchell v. Greenough,* 100 F. (2d) 184, this distinction is discussed. The action under civil rights statutes for damages for conspiracy to deprive plaintiff of right to practice law through a conviction by use of perjured testimony. Section 47 was the basis of plaintiff's complaint, and was held not applicable because it related to equal protection of the laws, which is not the same as due process of law.

> "The prohibition against denial of the equal protection of the law was to prevent class legislation or action."

> "The question then is whether or not a conspiracy to secure a conviction of a criminal offense in a Court having jurisdiction thereof and of the defendant knowingly using perjured testimony to convict an innocent person, is a conspiracy for the purpose of impending the due course of justice in an attempt to deny to any citizen the equal protection of the laws. It is only in case of a conspiracy to effectuate such a purpose that one

damaged in his person or property, or deprived of his rights as a citizen of the United States, is entitled to maintain an action for damages in the Federal Courts under the Statute."

"No such purpose was involved in the alleged conspiracy in the case at bar. Appellant was subjected to no greater hazard of being prosecuted for a crime and convicted by false testimony * * *."

Thus, if appellant in our case has a cause of action, it must be based on Section 43 of Title 8 U.S.C.A., which states:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Section 47 does not apply, hence the allegations of conspiracy must be disregarded as surplusage and the acts of each individual defendant must be examined to determine if any one of them committed an act damaging cross-petitioner as defined in Section 43, Title 8, U.S.C.A.

It is submitted that everything that any defendant did was lawful and did not interfere with appellant's freedom of speech.

The Courts will not inquire into the propriety of the resolution creating the State Un-American Activities Committee and will accept the declaration in the creating resolution that the information is sought for legislative purpose. *United States v. Josephson,* 165 F. (2d) 82; *Barsky v. United States,* 167 F. (2d) 241. Hence, everything done by the committee was lawful and proper and while it may have inconvenienced appellant to appear, so would it inconvenience any citizen to appear before the committee to testify, or so it does inconvenience every witness called to testify in court.

This phase of the case is more completely covered by the brief of the petitioning members of the Un-American Activities Committee and this cross-petition concurs in their position. Obviously, if no cause of action is stated as to the members of the committee, then none is stated as to cross-respondent Elmer E. Robinson.

Wherefore, it is submitted that the complaint was properly dismissed on the ground that it failed to state a cause of action of which the Federal Court had jurisdiction.

III.

SECTION 43, TITLE 8, U.S.C.A., DOES NOT APPLY TO CROSS-RESPONDENT ELMER E. ROBINSON, AS A PRIVATE CITIZEN NOT ACTING UNDER COLOR OF STATE AUTHORITY.

So far as cross-respondent Elmer E. Robinson is concerned, cross-petitioners are faced with a further legal obstacle to stating a cause of action. By an un-

broken line of case, the Supreme Court has consistently held that, with the exception of purely Federal rights (right to vote in Congressional election, etc.), the power of Congress to pass enabling legislation under the 14th Amendment is limited to limitations upon State action and State officials or agents acting under color of State authority.

Civil Rights cases, 109 U.S. 3, 27 L. ed. 835;
Hodges v. United States, 203 U.S. 1, 51 L. ed. 65;
Butts v. Merchants Co., 230 U.S. 126, 57 L. ed. 1422;
Wheeler v. United States, 254 U.S. 281, 65 L. ed. 270;
Screwes v. United States, 325 U.S. 91, 89 L. ed. 1495;
Powe v. United States, 109 F. (2d) 147;
Love v. Chandler, 124 F. (2d) 785;
Watson v. Oakland Jockey Club, 86 F. (Supp. 1006).

Thus, cross-respondent Elmer E. Robinson, as an individual, could not be civilly sued under a Congressional Act for violating any non-Federal civil rights protected by the 14th Amendment, such as freedom of speech. Cross-petitioner attempts to avoid this problem by asserting that a person not able to commit a crime himself can be liable for conspiracy with others to commit the crime. He cites several cases. These cases merely hold that "A" may be criminally guilty of conspiring with "B" to commit a criminal act, even though "A" could not commit the act him-

self. For example, in the *Downs case,* 3 Fed. (2d) 855, it was held that officers of the law could be convicted of conspiring with two other persons to bribe themselves, even though they could not personally be convicted of the substantive crime of offering themselves a bribe.

In *Picking v. Penna. Ry.,* 151 F. (2d) 240, which is relied on by cross-petitioner, the private individual, Pennsylvania Railroad was dismissed from the case in a later proceeding in the lower court 66 F. Supp. 233 and hence the language of the Circuit Court decision should not be persuasive.

Cross-petitioner also cites *United States v. Trieweiler* 52 F. Supp. 4, for support of this point. However, a reading of the case shows such a proposition to be dicta because all persons connected with the criminal conspiracy to violate civil rights were officers or deputies or members of a legally constituted posse. Thus, all defendants would be acting under color of state authority. In our case it is admitted that cross-respondent Elmer E. Robinson was acting as a private citizen. Furthermore in concluding the opinion the Court in the *Trieweiler* case, said:

> "But where, as here, it is charged that the defendants, as instrumentalities of the state and under color of authority as instrumentalities conspire to deprive a citizen of his constitutional rights, there is a plain averment of facts creating jurisdiction."

The cases that actually support the position of cross-petitioner are criminal cases not in the field of civil rights and they are not applicable in the instant

case, because in each of the cases cited, a conspiracy to commit a particular crime was a separately recognized offense within itself.

Cross-petitioner overlooks one thing. In the cases cited, there was jurisdiction and power to define a crime. In our case, Congress is without constitutional power to legislate civil liability upon private individuals under the 14th and 15th Amendments. It cannot do indirectly what it cannot do directly, and any construction of a Congressional Act beyond the constitutional power to legislate would be as unconstitutional as the bad legislation itself. Furthermore, civil liability under an alleged conspiracy is different than a criminal conspiracy. In the case of a crime, the conspiracy is punished. In the case of civil conspiracy, the gravamen of the action is the civil wrong done. There is no civil liability for a conspiracy as such. The liability is for the actual wrong committed. *Moffett v. Commerce Trust Co.* (supra).

Thus cross-respondent Elmer E. Robinson, if liable at all, would be liable for damages resulting from any of his own acts claimed to have interfered with appellant's civil rights and not the conspiracy. For this reason, appellant cannot avoid the constitutional barrier to the present claim against cross-respondent Elmer E. Robinson as an individual.

Section 43 of Title 8 of USCA (color of authority section), cited by cross-petitioner, cannot be the basis of an action against Elmer E. Robinson, because he was admittedly not acting under color of State authority. Cross-petitioner's only possible claim of jurisdiction over Elmer E. Robinson is

that he would be liable under Section 47 (3d) Title 8 USCA because he conspired with others who acted under color of State authority. However, it has been held that this section applies to equal protection of the laws and not to rights arising under the due process provisions of the 14th Amendment, *McShane v. Moldovan,* 172 F. (2d) 1016 and even if it applied to rights arising under the due process clause of the 14th Amendment, private citizens, would not be subject to liability for the reasons noted above. Furthermore, even if Congress intended to provide for a cause of action against persons not acting under state authority, through the guise of a conspiracy statute, the constitutional bar would prevent such action.

Wherefore, it is submitted that the complaint was properly dismissed on the ground that the Federal Court had no jurisdiction in a civil suit for damages against cross-respondent Elmer E. Robinson, as an individual, not acting under color of authority.

CONCLUSION.

Wherefore cross-petitioner submits that Brandehove's cross-petition for writ of Certiorari be denied for the reasons herein advanced.

Dated, San Francisco, California,
November 15, 1950.

Respectfully submitted,
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